Filed 8/10/04 P. v. Mills CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD F. MILLS,

Defendant and Appellant.

F044807

(Super. Ct. No. 03-109976)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, and Charles A. French, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Cornell, J. and Gomes, J.

STATEMENT OF THE CASE

On August 14, 2003, the Tulare County District Attorney filed an information in superior court charging appellant as follows:

Counts I-VII—lewd or lascivious acts with a child under age 14 (Pen. Code, § 288, subd. (a)) by a habitual offender (§ 667.71) with two separate aggravated circumstances (§ 667.61, subds. (a), (b)), a prior strike conviction (§ 1170.12, subd. (c)(1)), a prior serious felony conviction (§ 667, subd. (a)(1)), and a prior violent felony (§ 667.5, subd. (a)).

Counts VIII and IX—using a minor for sexual acts (Pen. Code, § 311.4, subd. (c)) with a prior strike conviction (§ 1170.12, subd. (c)(1)) and a prior prison term (§ 667.5, subd. (b)).

On October 7, 2003, the court denied appellant's motion for new counsel under *People v. Marsden* (1970) 2 Cal.3d 118.

On October 21, 2003, appellant entered into a plea agreement with the prosecution. Appellant pleaded nolo contendere to all of the substantive counts, admitted the truth of the related special allegations, and expressly waived his right to appeal the sentence and any other issue related to his offenses. The court noted appellant's maximum exposure was 79 years four months-to-life in state prison and indicated it would impose a term of 30 years to life in state prison.

On or about November 18, 2003, appellant moved to withdraw his plea on the ground he failed to understand his plea and its consequences.

On December 10, 2003, the court denied appellant's motion for new counsel under *Marsden* and for self-representation under *Faretta v. California* (1975) 422 U.S. 806.

On December 23, 2003, appellant filed a written motion to withdraw his plea (Pen. Code, § 1018). Appellant alleged "on the day he pleaded to the offense he was under the influence of prescription medication for mental health issues and unable to understand the

nature of the proceedings and make a voluntary and intelligent waiver of his constitutional rights."

On January 15, 2004, the court conducted a contested hearing and denied appellant's motion to withdraw his plea. The court then denied appellant probation and sentenced him to a total term of 30 years to life in state prison.

DISCUSSION[1]

Appellant's appointed counsel has filed an opening brief which adequately summarizes the facts and adequately cites to the record and asks this court independently to review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) By letter of May 12, 2004, this court invited appellant to submit additional briefing and state any grounds of appeal he may wish this court to consider. In the concluding paragraph of the opening brief, appellant personally requested this court to address (a) the denial of his motion to withdraw the plea of no contest; (b) the summary denial of his postplea motion for self-representation under *Faretta v. California, supra,* 422 U.S. 806; and (c) the seizure of the videotape evidence by his landlords.

A. Motion to Withdraw Plea

In his December 23, 2003, motion to withdraw plea, appellant alleged his no contest plea "was unknowing, unintelligent and involuntary due to his being under the influence of anti-psychotic medication at the time of the plea."

A criminal defendant may move to withdraw a previously entered plea of guilty at any time before judgment upon a showing of good cause. (Pen. Code, § 1018.) Good cause exists when the defendant acted under mistake, ignorance, or any other factor

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[1] As the appellant has waived all issues except the denial of his motion to withdraw his plea and to represent himself, the facts of the underlying offenses are not relevant and will not be discussed.

overcoming the exercise of free judgment. Good cause does not exist simply because the defendant has changed his mind. The defendant must establish good cause by a strong showing of clear and convincing evidence. (*People v. Cruz* (1974) 12 Cal.3d 562, 566; *People v. Huricks* (1995) 32 Cal.App.4th 1201, 1207-1208; *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456-1457; *People v. Quesada* (1991) 230 Cal.App.3d 525, 538, disapproved on another point in *People v. Gontiz* (1997) 58 Cal.App.4th 1309, 1316.)

The following exchange occurred at the October 21, 2003, change of plea hearing:

"THE COURT: [¶]…[¶] I've told your attorney that if you plead today, I'm prepared to give you 30 years to life which is the least that I can give you and everything else would be concurrent. And your attorney tells me you're prepared to plead no contest with that understanding; is that correct?

"THE DEFENDANT: Yes.

"THE COURT: The other consequences of your plea are as follows: [court recites the consequences of the plea]. [¶]…[¶] Those are the consequences of your plea. With all that in mind, is it your intention to plead guilty or no contest today?

"THE DEFENDANT: No contest.

"THE COURT: Do you understand a no contest plea is the same as a guilty plea for purposes of sentencing?

"THE DEFENDANT: Yes.

"THE COURT: Have you used any drugs or alcohol or taken any medication that's affecting your ability to understand what we're doing here today?

"THE DEFENDANT: No.

"THE COURT: Have you had any difficulty communicating with your attorney?

"THE DEFENDANT: No.

"THE COURT: Have you given your attorney all the information you have regarding these charges?

"THE DEFENDANT: Yeah.

"THE COURT: Has your attorney advised you of the possible defenses you might have?

"THE DEFENDANT: Yes.

"THE COURT: Are you satisfied with the services and advice of your attorney?

"THE DEFENDANT: Yes.

"THE COURT: Other than what I've told you regarding the consequences of your plea, has anybody promised you anything or threatened you in any way to get you to plead no contest today?

"THE DEFENDANT: No.

"THE COURT: Are you aware of any such promises or representations, Mr. Terry [defense counsel]?

"MR. TERRY: I am not, your Honor. [¶]...[¶]

"THE COURT: Mr. Terry, have you had sufficient time to discuss this case with your client?

"MR. TERRY: I have.

"THE COURT: Have you advised him of his constitutional rights, the consequences of his plea, the nature of the charges against him, and any possible defenses he might have?

"MR. TERRY: Yes.

"THE COURT: Mr. Mills, do you have any questions regarding the rights you're giving up, the consequences of your plea, the nature of the charges against you, or any questions at all?

"THE DEFENDANT: No."

In the instant case, appellant pleaded no contest after being fully advised of his rights and of the consequences of his plea. The transcript of the change of plea hearing indicated appellant answered the court's questions appropriately and understood what was taking place in the courtroom. The court specifically asked whether appellant had

taken any medication that affected his ability to understand and appellant said he did not. The court further asked whether appellant had any questions and appellant replied in the negative. He also acknowledged he had no difficulty in communicating with his defense counsel. At the time of the plea, neither the court nor defense counsel noted on the record that defendant was acting confused, incoherent, or under the influence.

Under all of the facts and circumstances, we simply cannot say that appellant marshaled clear and convincing evidence of his being under the influence of anti-psychotic medication at the time of the change of plea hearing. His contention must be rejected.

B. Denial of *Faretta* Motion

Appellant contends the court committed error by summarily denying his postplea motion for self-representation under *Faretta v. California, supra,* 422 U.S. 806.

The following exchange occurred at the December 10, 2003, hearing under *People v. Marsden, supra,* 2 Cal.3d 118:

> "THE COURT: All right. Mr. Mills, it's your desire ... that the Public Defender be removed as your attorney for purposes of the motion for new trial; is that correct?
>
> "THE DEFENDANT: Yes.
>
> "THE COURT: What's the basis for that?
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> "THE DEFENDANT: The basis is he told me last time I was in here I was stupid and foolish and he has no interest in my case at all from day one. He told me to take the plea and I'm not doing it.
>
> "THE COURT: Well, you've already done it, sir.
>
> "THE DEFENDANT: But he's railroaded me.
>
> "THE COURT: In what way?
>
> "THE DEFENDANT: In what way? From day one he says there's nothing he can do for my case, there's nothing.… [¶]...[¶]

"THE COURT: Mr. Terry?

"MR. TERRY: Yes, your Honor, as I explained to Mr. Mills previously and the prior Marsden that he did …. I had discussed Mr. Mills' case with him. It is a case where there are allegations of child molest involving two boys. There ... is a videotape that was obtained by a third party non-police officer witness ... that shows Mr. Mills doing these acts. And I had informed him that there was no basis for motion to suppress. I researched the issue. I informed him of that.…

"I also informed him that there was very little I can do with regards to these charges since there is direct evidence on the videotape showing him and it does show him committing these acts. [¶] In addition, I told him I would attempt – if it were to go to trial that I would attempt to have that excluded. However, I did not have much hope as to being able to exclude that tape.

"THE COURT: What would have been your basis for excluding the tape?

"MR. TERRY: It would be based upon the similar types of arguments to the scenes depicting him in, the shooting scenes, those types of things. That was going to be the basis for the motion.

"THE COURT: Graphic?

"MR. TERRY: Yes.

"THE COURT: It would have been denied.

"MR. TERRY: I know that, your Honor. I was aware of that. I told him I did not have much hope of that, but I was planning on presenting that to the court and that was the only basis for excluding that evidence. [¶]...[¶]

"THE COURT: Do you have any other reasons for wanting to get rid of your attorney, Mr. Mills?

"THE DEFENDANT: No, that's it.

"THE COURT: Your motion is denied. I find there is insufficient cause to remove the Public Defender.

"THE DEFENDANT: Well, I want to go pro per then. I don't want the Public Defender's office at all.

"THE COURT: Well, you have the right to go – well, no you don't have the right to go pro per after trial.

"MR. TERRY: He hasn't been to trial.

"THE COURT: After plea. So this matter is going forward. And I'm going to sentence him today."

If a defendant makes a timely request for self-representation under *Faretta*, his or her right to do so is unconditional and the trial court must grant the request. However, "timely" means within a reasonable time prior to commencement of trial and a later request is within the discretion of the trial court to grant or deny. Also, a motion for self-representation made in passing anger or frustration may be denied. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1087.)

A trial court faced with an untimely request should consider such factors as the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.

In the instant case, appellant moved for self-representation immediately after denial of his second motion for substitution of counsel under *People v. Marsden, supra,* 2 Cal.3d at p. 124. Appellant had already pleaded no contest to the substantive counts and admitted the truth of the related special allegations. Appellant claimed counsel was railroading him and had taken no interest in his case "[f]rom day one." Counsel explained there was very little he could do on appellant's behalf because there was videotape evidence showing appellant engaged in the commission of the charged acts. Appellant could not offer any other reasons for the removal of counsel. From all of the facts and circumstances, the trial court could reasonably conclude appellant made his untimely *Faretta* motion in passing anger or frustration and therefore properly denied his request for self-representation.

C. Seizure of Videotape Evidence

Appellant apparently maintains the trial court should have suppressed videotape evidence seized by his landlords. Appellant waived all appeal rights as part of his negotiated disposition. That waiver included any contest to the seizure of evidence. Even if the waiver did not preclude consideration by us, we would not have overturned the use of the tapes.

The Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his or her own initiative. (*Skinner v. Railway Labor Executives' Ass'n.* (1989) 489 U.S. 602, 614.) A search or seizure by a private party does not implicate the Fourth Amendment unless the party is acting as the instrument or agent of the government. In determining whether a private party has so acted, we consider several factors, including whether (a) the government knew of and acquiesced in the intrusive conduct; (b) the private party's purpose in conducting the search was to assist law enforcement; and (c) the government requested the action or offered the private party a reward. We conduct this analysis on a case-by-case basis in light of all the circumstances. The defendant bears the burden of proving that a private party acted as an agent of the government. The mere fact that police witness a private party's search does not transform the private party into a governmental agent. (*U.S. v. Crowley* (7th Cir. 2002) 285 F.3d 553, 558-559.)

Nothing in the instant record suggests that law enforcement knew in advance and acquiesced in the conduct of appellant's landlords. Nothing in the record indicates the purpose of the landlords in conducting the search was to assist law enforcement. Moreover, nothing in the record shows that law enforcement requested the search or offered the landlords a reward in exchange for their information and the videotapes. If anything, the record demonstrates that the landlords entered appellant's trailer at his request, found the incriminating evidence, and reported it to law enforcement on their own initiative. Their seizure of the videotapes did not implicate the Fourth Amendment

and the lack of a suppression motion under these damning circumstances does not constitute error.

Our independent review discloses no other reasonably arguable appellate issues. "[A]n arguable issue on appeal consists of two elements. First, the issue must be one which, in counsel's professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment." (*People v. Johnson* (1981) 123 Cal.App.3d 106, 109.)

DISPOSITION

The judgment is affirmed.